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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1213

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

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SUBJECT INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes	3
Statement of the case	4
I	
Introduction	4
II	
Statement of facts	5
III	
Procedural status	8
IV	
Parties	9
V	
Trial court decision	10
VI	
California Court of Appeal decision	12
A. The court erred in holding that the department's preferential employment practices did not violate the Fourteenth Amendment	14
1. The court's reliance on Bakke was misplaced	14
2. The Court of Appeal failed, in fact, to apply strict scrutiny in reviewing and approving the state's AAP	16
B. The court erred in relying on Weber to hold that the department's practices did not violate Title VII	21
1. The petitioners are afforded no less protection under Title VII than under the Fourteenth Amendment	21
2. Under Title VII, as under the Fourteenth Amendment, remedies adopted must be the least intrusive upon the rights of innocent parties	23
C. The court erred in finding no violation of California law	26
Reasons for granting a writ	26
Conclusion	31

TABLE OF AUTHORITIES CITED

Cases

	Page
IAFF v. City of Palo Alto, 60 C.2d 295 (1963)	10
Allee v. Medrano, 416 U.S. 802 (1974)	9
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	15, 22
Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968)	15, 29
Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), cert. den. 421 U.S. 991 (1975)	19
Brown v. Board of Education, 349 U.S. 294 (1954)	15
Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976) cert. den. 431 U.S. 965 (1977)	19, 25
Cooper v. Aaron, 358 U.S. 1 (1958)	15
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	22
Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976)	25
Fullilove v. Kreps 584 F.2d 600 (2d Cir. 1978), cert. granted, 99 S.Ct. 2403 (May 21, 1979)	29, 30
Hazelwood School District v. United States, 433 U.S. 299 (1977)	19, 20, 23
International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977)	25
Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975), cert. den. 429 U.S. 823 (1976)	19, 25
Kramer v. Union School District, 395 U.S. 621 (1969)	21
Monroe v. Board of Commissioners, 391 U.S. 450 (1968)	15
Personnel Adm's of Massachusetts v. Feeney, 99 S.Ct. 2282 (1979)	22
Price v. Civil Service Commission, (S.Ct. No. SF 23836)	30
Professional Firefighters Inc. v. City of Los Angeles, 60 C.2d 276 (1963)	9, 10
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	4, 12, 14, 15, 16, 17
Sail'er Inn v. Kirby, 5 C.3d 1 (1971)	26
Smith v. Board of Education of Morrilton School Dist., No. 32, 365 F.2d 770 (8th Cir. 1966)	15
Steele v. Louisville and Nashville Railroad, 323 U.S. 192 (1944)	25
United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972)	15
United States v. State of New Hampshire, 539 F.2d 227 (1st Cir. 1976), cert. den. 429 U.S. 1023 (1976)	22

Table of Authorities Cited

Cases

	Page
United Steel Workers of America, AFL-CIO v. Weber, et al., (1979) .... U.S. ....), 99 S.Ct. 272, 61 L.Ed.2d 480	5, 13, 21, 23, 24, 25, 26, 28
Usery v. Allegheny Co. Institution District, 544 F.2d 148 (3rd Cir. 1979)	22
Usery v. Charleston School District, 558 F.2d 1169 (4th Cir. 1977)	22
Washington v. Davis, 426 U.S. 229 (1976)	5, 13, 14, 15, 22
Washington v. Lee, 263 F.Supp. 327 (M.D. Ala. 1966), aff'd per curiam, Lee v. Washington, 390 U.S. 333 (1968)	15
White v. Carolina Paper Board Corp., 564 F.2d 1073 (4th Cir. 1977)	19

Constitutions

California Constitution:	
Article I, Section 7	3, 10, 13
Section 8	3, 10, 26
United States Constitution:	
First Amendment	14
Fourteenth Amendment	3, 4, 8, 10, 12, 13, 14, 22, 23, 27, 29, 30
Fourteenth Amendment, Section 5	22

Statutes

California Government Code:	
Sections 3525, et seq.	1
Section 50084	3, 10
California Labor Code, sections 1410, et seq.	3, 10
28 U.S.C. Section 1254(1)	2
29 U.S.C. Section 206(b) (Equal Pay Act)	22
42 U.S.C.:	
Section 1981	3, 8, 10, 13
Section 1983	3, 8, 10, 13
Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000(e), et seq.	3, 8, 10, 12, 13, 19, 20, 21, 22, 23, 24

Other

H.R. Rep. No. 238, 92 Cong. 1st Sess. (1971)	22
Legislative History, 1972, U.S. Code Cong. & Ad. News 2154	22
S. Rep. No. 415, 92 Cong. 1st Sess. 24 No. 11 (1971)	22

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Petitioners WAYNE MINNICK, HENRY J. DARDEN and the CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION[1] respectfully pray that a Writ of Certiorari issue to review the decision rendered by the California Court of Appeal, First Appellate District, Division Four, entered in this case on July 27, 1979 as modified on August 23, 1979.

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[1]The California Correctional Officers Association (hereinafter referred to as "CCOA"), is a recognized agent of correctional officers and other employees of the California Department of Corrections, pursuant to California Gov. Code §§ 3525, *et seq.*, for purpose of representing them in all matters relating to employment conditions and employer-employee relations. (Findings of Fact, App. F, p. 2).

OPINIONS BELOW

The opinion of the California Court of Appeal (App. A *infra*) is reported at 95 Cal.App.3d 506. A modification of the opinion and a denial of a petition for rehearing (App. B, *infra*) is reported at 96 Cal.App.3d 626a. The order denying your petitioners' Petition for Hearing before the California Supreme Court (App. C, *infra*) is not reported. The opinion of the trial court (App. D, *infra* under the caption "Notice of Intended Decision"), its judgment (App. E, *infra,* under the caption "Judgment and Declaratory Judgment"), its Findings of Fact and Conclusions of Law (App. F, *infra*), and its Permanent Injunction (App. G. *infra*) are not reported.

JURISDICTION

The opinion of the California Court of Appeal, First Appellate District, Division Four, was filed on July 27, 1979. That court's order, denying your petitioners' Petition for a Rehearing and the accompanying modification of the initial opinion, was filed on August 23, 1979. A petition for a hearing by the California Supreme Court was filed in a timely fashion on September 5, 1979, and was denied by the California Supreme Court on November 8, 1979 (Appendix C). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a state agency may, absent proof that it has engaged in previous intentional discrimination, voluntarily establish goals, set aside positions and grant preferences, for the hiring and promotion of less qualified

minorities and women, to the detriment of all other applicants and employees.

2. Whether the safe and efficient operation of correctional facilities constitutes a sufficient compelling interest to justify the use of racial and sex-based preferences in hiring and promotion, and if so, whether proof of that interest was sufficiently supported by the record.

3. Whether it is sufficient for a state agency to adopt preferential employment practices based solely upon conclusory allegations of the discriminatory impact of its past policies and practices on minorities and women.

4. Whether it is appropriate for a state correctional institution to institute employment goals for minorities based upon inmate population rather than the relevant labor market or applicant flow.

5. Whether the relevant labor force for the hiring of women should be based on state-wide employment statistics for women as opposed to applicant flow or the labor force statistics for women in the relevant geographic area in which the institutions are located.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are: U.S. Const. Amend. XIV; 42 U.S.C. §§ 1981, 1983 and 2000(e), *et seq.;* Calif. Const. A. I, §§ 7 and 8; Calif. Labor Code §§ 1410, *et seq.,* and Calif. Gov. Code § 50084, all of which are set forth *seriatim* in Appendix H.

STATEMENT OF THE CASE

I

INTRODUCTION

This is an action brought by two Caucasian male employees, and the CCOA, a recognized bargaining agent for correctional officers and other employees of the California Department of Corrections (hereinafter referred to as "the Department"). The Department voluntarily developed and implemented an affirmative action plan (hereinafter "AAP") and granted preferences to minorities and women in the absence of proof of any prior discrimination. The objectives of the AAP were twofold: 1) attaining a percentage of various minority groups in the Department's work force to reflect their percentage in the inmate population, and 2) attaining a percentage of women in the Department's work force to reflect their percentage in the total California state labor force. Employment preferences were granted to attain goals contained in the AAP. In furtherance of the goals, certain positions were set aside solely for minority and female applicants and employees. The rights of all other applicants and employees, secured by the Fourteenth Amendment, are violated by these policies and practices.

Petitioners believe that immediate review of the issues raised herein is important to the national interest insofar as immediate guidance is needed for thousands of public employers and many times that number of employees around the country. It is necessary for this court to resolve the tension created by *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), which permitted the

limited use of preferences based in admissions policy based on race in state higher educational institutions and *Weber* [*United States Steel Workers of America, AFL-CIO v. Weber, et al.*, ... U.S. ....., 99 S.Ct. 272, 61 L.Ed.2d 480 (1979)], which permitted private employers to voluntarily adopt AAPs absent a showing of prior discrimination, in light of *Washington v. Davis,* 426 U.S. 229 (1976), which requires public entities to show that they had engaged in prior intentional discrimination before imposing race-conscious remedies.[2]

II

STATEMENT OF FACTS

The California Department of Corrections voluntarily adopted an affirmative action program in 1974. Despite the binding disclaimer that it had engaged in any past intentional discrimination,[3] the Department adopted and imple-

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[2]The need for immediate guidance for California public employers and employees is even more urgent in light of the opinion of the California Supreme Court in *Price v. Civil Serv. Comm.*, which was released at the time that this petition was being prepared for the printer. It is discussed more fully in Reasons for Granting a Writ, section five, *infra,* beginning at page 30.

[3]In response to an interrogatory the Defendants disclaimed having engaged in any prior, intentional discrimination. They also advanced an assertion of "adverse impact" which the California Court of Appeal denoted as the only substantial evidence in the record of past discrimination (App. A, p. 9). The interrogatory and answer are as follows:

"INTERROGATORY 1.

Do you contend for the purposes of this litigation that the Department of Corrections of the State of California, or any of its agents, employees, representatives, officers, officials or other authorized representatives, illegally or improperly discriminated against any person with regard to employment opportunities or employment wages, hours, or other terms and conditions of employment, on the basis of that person's race, color, creed, sex or national origin?

mented the AAP with the stated principal objectives of increasing the number of "minority" employees in the Department to a level equalling at least 70% of any given "minority" in the inmate population of the Department (i.e., state prisoners) and increasing the number of female employees to a percentage equivalent to that in the total California labor force in April, 1970 (App. A, pp. 5-6). Goals were set for specified minority groups, including "Black", "Asian", "Spanish surname", "Native American", and "other extraction." An "overall" goal of 36% minorities employed and 38% women employed was established. The AAP stated that achieving these goals would serve the Department's objective of improving relationships with prisoners and reducing racial conflict and violence in the prison system (App. A, p. 6). Although the percentages of women and minorities to be employed as new hires by the Department were targeted to be attained by July 1979, the objectives of the AAP were to continue indefinitely to apply to all other areas of employment, including promotion, transfer, training and work assignments (App. A, p. 7).

Preferences granted to minority or female employees caused them to be hired, promoted, or transferred, over

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ANSWER

For the purpose of this litigation the Department of Corrections of the State of California does not allege that it has wilfully, with a specific intent, engaged in illegal and/or improper discrimination against any person with regard to employment opportunities or employment wages, hours, or other terms and conditions of employment on the basis of a person's race, color, creed, sex or national origin. The department does allege, however, that as a result of its past hiring and promotion practices and procedures, there has been an adverse discriminatory impact on certain minorities and the female sex, in terms of initial hiring and also promotion." (CT pp. 121-122).

other more qualified applicants and employees. The record clearly establishes that sex and race were prime factors for these employment decisions. Certain positions were set aside for females or minorities and were labeled "female only" or "minority only" (App. A, p. 8; App. F, p. 4). For example, positions were advertised as "Correctional Sergeant-Minority" (Exhibit 11), "Correctional Counselor I-Female" (Exhibit 12), (R.T. 98-99), "Records Officer I-Minority" (Exhibit 13), and "Correction Lieutenant-Minority" (Exhibit 13). The application for Field Representative stated that applications would be accepted from women only (Exhibit 6, p. 6).

Even where positions were not reserved by title to minorities or females, the intention to fill positions with minorities and females officially was made clear by management personnel and their agents, including oral interview panelists, superintendents of institutions, and the Director of the Department himself (Exhibit 1, RT 39; Exhibit 3, RT 55-56; Exhibit 6, p. 1). Employees were told that because of their race or sex they need not apply or would not be considered, for employment positions (RT 50, 69-70, 119-121, 129, 150-151). One officer was instructed not to consider Caucasian candidates in hiring clerical workers, and the Department downgraded positions to obtain sufficient minorities to fill those positions (RT 170, 700, 715). In a memo, that officer questioned why he should even interview white applicants "knowing that institution policy is to hire only minorities until a selective quota is met" (Exhibit M). In yet another instance, in reply to a grievance filed by a Caucasian male, the Department Director told him he was "sorry, but that affirmative

action was something we all had to deal with and several of us would have to pay the price for it . . ." and that the Caucasian male was one person who would be paying the price (RT 151-152).

III

PROCEDURAL STATUS

On December 30, 1975, petitioners Wayne Minnick, Henry J. Darden and CCOA brought this action in the Superior Court of the State of California in and for the City and County of San Francisco (CT, p. 1). The Amended Complaint, filed on February 10, 1976, alleged that the California Department of Corrections granted preferences based on race and sex in hiring, promotions and other terms and conditions of employment, to the detriment of other applicants and employees who were passed over because of their race or sex. The petitioners alleged that such use of race or sex as a factor, or the sole factor, in employment decisions violated rights under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §§ 1981, 1983, and 2000(e), *et seq.*, and various California constitutional and statutory provisions (CT pp. 63-81).

On October 12, 1977, following a non-jury trial, a Judgment and Declaratory Judgment and a Permanent Injunction in favor of petitioners in this action were entered (App. E and G). The respondents Department of Corrections and Director Enomoto filed a notice of appeal on October 14, 1977, and subsequently sought a writ of supersedeas from the California Court of Appeal. The Court of Appeal entered an order staying enforcement

of the Judgment and Permanent Injunction during the pendency of the appeal (App. B, p. 15). The California Court of Appeal entered its decision overturning the trial court. Petitioners applied for a hearing and were denied a hearing by the California Supreme Court on November 8, 1979, as described *supra* at page 2.

IV

PARTIES

CCOA did not agree with the AAP and actively opposed it, as is clear by its participation as a party to this lawsuit. Petitioners Minnick and Darden were denied promotion in deference to female or minority candidates (App. A, p. 7), as were various other employees (App. A, p. 7). CCOA fairly and adequately represented the interests of all members disadvantaged by said practices (Finding of Fact 3, App. F, p. 2). Members of CCOA, including petitioners Minnick and Darden, will be affected by future implementation of the AAP with respect to job opportunities (Finding of Fact 14, App. F, p. 5).[4] CCOA, of course, had standing to bring the action under the doctrine of *Allee v. Medrano*, 416 U.S. 802 (1974), *Professional Firefighters Inc. v. City of Los An-*

[4]The trial court found that petitioners Minnick and Darden were not entitled to monetary damages and denied a motion to certify a class. However, the court accepted a stipulation by the parties that the standing of CCOA, Minnick and Darden would not be affected with respect to declaratory and injunctive relief ordered by the court, and issued an order to that effect (CT 1194-1195). Furthermore, the stipulation only carried out what the record has reflected—that correctional officers who were certifiable within the "rule of three" had been passed over and had testified that they were willing to be amended into the action as plaintiffs-petitioners (R.T. 7-14). Such amendments would have been timely and proper under California law, at the time the stipulation was accepted.

geles, 60 C.2d 276 (1963) and *IAFF v. City of Palo Alto,* 60 C.2d 295 (1963).

The complaint named as defendants the respondents, California Department of Corrections and Jiro J. Enomoto in his representative capacity as the Department's Director. Judgment was not taken against the other defendants, California State Personnel Board, and Carlos Sanchez, a Deputy Director of the Department of Corrections.

V

TRIAL COURT DECISION

The trial court held that the defendants' use of sex or racial background or ancestry as a factor, or the sole factor, in selecting applicants for employment and in promoting employees was unconstitutional and void (App. D). A judgment was issued to the effect that by discriminating in hiring and promotions, the Department and its Director were violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.,* Article I, §§ 7 and 8 of the California Constitution, 42 U.S.C. §§ 1981 and 1983, California Labor Code §§ 1410, *et seq.,* and California Government Code § 50084. Additionally, the judgment found the arbitrary and capricious nature of the racial categorization process to violate substantive and procedural due process guaranteed by the United States Constitution and Article I, § 7 of the California Constitution (App. E, p. 2).

Pursuant to the judgment, the Permanent Injunction enjoined the defendants and their agents from granting

any preference, advantage or benefit on the basis of race, color or national origin in *hiring or promotion,* but excluded from its prohibition the use of race or sex as relevant factors in the determination of *assignments and job responsibilities* of employees in the Department, and provided for "male only", "female only" and bilingual certification for positions where the job-relatedness of requirements could be objectively demonstrated (App. G, p. 2).

The judgment was supported by the Findings of Fact. The Court found that the Department's discrimination was, at least, in part motivated by the AAP which caused preferences to be granted on the basis of race or sex and not solely on the qualifications or merits of the individual (Finding of Fact 8, Exhibit F, p. 3-4). Although the trial court recognized long standing discrimination against minorities and women by our society, it found that the preferential employment practices in question were not justified by, nor did they remedy, such past wrongs and found that such preferences acted to the detriment of innocent employees of the Department (Finding of Fact 13, Exhibit F, p. 5). In addition to lacking a nexus between the use of race and sex and any past discrimination by society, the plan and resulting preferences were found to be arbitrary and capricious since the program was devoid of scientific or objective standards for classifying people into racial categories, and had no dispute-resolution or complaint procedures for such categorizations (Finding of Fact 16, Exhibit F. p. 6). However, the trial court found that the Department could consider the race and sex of an employee as a factor in job *assignment* and job *responsibil-*

ities, in contrast to job *opportunities,* to serve a "state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tension, and furthering orderly and efficient prison management" (Finding of Fact 19, App. F, p. 6). Thus, two distinct Conclusions of Law were entered, one finding preferential employment practices unlawful and another allowing the use of race and sex specifically and only as factors in determining job *assignments* and job *responsibilities* (Conclusion of Law, App. F, p. 8).

VI

CALIFORNIA COURT OF APPEAL DECISION

The California Court of Appeal reversed the lower court and held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was not violated. The court concluded that the preferences granted in the AAP and implemented by the state are within the purview of the type of plan permissible under *Regents of the University of California v. Bakke,* (hereinafter "Bakke") 438 U.S. 265 (1978). The Court of Appeal held that there is a compelling state interest in a safe and efficient correctional system to justify such preferences and that such interest is similar to the interest of the state in attaining "ethnic diversity" among its students (App. A. p. 16).

The Court also overturned that part of the judgment based on the trial court's Finding of Fact 16, that racial classifications on the basis of employee surnames, violated substantive and procedural due process rights guaranteed

by the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the California Constitution. The rationale for so holding was that there was no evidence showing that anyone had ever in fact been misclassified or aggrieved by such misclassification (App. A, p. 26). The respondents were found not to have violated 42 U.S.C. §§ 1981 and 1983 since they merely provide a remedy for Fourteenth Amendment violations (App. A, p. 24). Title VII, 42 U.S.C. §§ 2000(e), *et seq.* (hereinafter "Title VII"), was disposed of on the basis that "the fact that the Department is a public employer suggests no basis for excluding it from the reach of the Congressional intent and objectives analyzed in *United Steel Workers (United Steel Workers of America, AFL-CIO v. Weber, et al.,* (1979) ..... U.S. .....), [99 S.Ct. 272, 61 L.Ed.2d 480]" (App. B, p. 2), (hereinafter "*Weber*"). The court in so doing summarily dismissed issues and failed to address issues raised by the petitioners with respect to the requirements of *Washington v. Davis, supra.* The court clearly erred in looking solely to *Weber* as the applicable governing law. The decision, insofar as it relied on other California constitutional and statutory provisions, was overturned on the basis that these provisions provided no greater rights than those provided by the Fourteenth Amendment to the United States Constitution (App. A, pp. 23, 25).

A. The Court Erred in Holding that the Department's Preferential Employment Practices Did Not Violate the Fourteenth Amendment.

1. The Court's Reliance on Bakke was Misplaced.

Neither the AAP nor the practices of the Department comply with the requirements for a permissible program under Justice Powell's analysis in *Bakke,* which was relied upon by the Court of Appeal. *Bakke* requires the showing of a compelling state interest in using a burdensome classification, showing that the use of that classification is precisely tailored to serve the compelling governmental interest:

> "We have held that in 'order to justify the use of the suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.' " *University of California Regents v. Bakke,* 438 U.S. 265, 305.

In *Bakke,* Justice Powell found a State's interest in maintaining a diverse student body was a "special concern of the First Amendment" of a compelling nature such as to justify taking race into account in admitting medical students (*Ibid.,* at pgs. 311-315). No parallel First Amendment interest in diversity has been found to be appropriate in the employment context, nor has it been advanced as a compelling interest in this case. To date, the use of burdensome racial classifications in the employment context has been upheld solely for the remedying of past intentional discrimination by a public employer. *Washington v.*

Davis, 426 U.S. 229 (1976); *Arlington v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). The Department's stated objective for utilizing racial and sex-based classifications was to "serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence in the state prison system" (App. A, p. 6). The use of such classifications to serve the "operational needs" of a public employer, or to satisfy community preference has been repeatedly rejected, whether the preference inured to the benefit of minorities or non-minorities. *United States v. Scotland Neck City Board of Education,* 407 U.S. 484, 491 (1972); *Monroe v. Board of Commissioners,* 391 U.S. 450, 459 (1968); *Washington v. Lee,* 263 F.Supp. 327 (M.D. Ala. 1966), aff'd *per curiam, Lee v. Washington,* 390 U.S. 333 (1968); *Cooper v. Aaron,* 358 U.S. 1 (1958); *Brown v. Board of Education,* 349 U.S. 294, 300 (1954); *Baker v. City of St. Petersburg,* 400 F.2d 294 (5th Cir. 1968); *Smith v. Board of Education of Morrilton School Dist., No. 32,* 365 F.2d 770 (8th Cir. 1966). Moreover, the analogous notion that minority doctors are better able to serve minority communities was rejected as sufficient justification for the use of racial classifications by the United States Supreme Court in *Bakke, Id.* 438 U.S. 265, at 311.

Moreover, even if the state's purported interests were found to be compelling, the preferences granted fail to comport with the requirements set forth by Justice Powell, as relied upon by the Court of Appeal. Under Justice Powell's analysis, race or ethnic background may be used as a "plus" in an applicant's favor if (1) this does not

insulate individuals from comparison with all other candidates for available positions and (2) candidates without the "plus" are not totally excluded from fair and competitive evaluation from a specific percentage of positions. (*Bakke, Id.* at 316-319). We do, however, contend that even the above *Bakke*-type of preference is not constitutional in the employment context.

The Department's AAP failed to qualify under both above-described prerequisites. The Court of Appeal itself recognized that Caucasians and males were totally excluded from a specific percentage of positions when it indicated that the stated goals of the Department were to attain a level of minority employees equalling at least 70% of every given minority in the inmate population (translating into a goal of 36% overall minority employment), and to employ women in 38% of its positions (App. A, p. 6). The evidence clearly demonstrates that minorities and women were insulated from comparison with all other candidates for available positions (see Statement of Facts, pp. 7-8). Additionally, the court ignored its own characterization that such was the case:

> "Some of these positions were labelled 'female only,' or with words similarly referring to sex (including 'male only') or to race or ethnic background." (App. A, p. 8).

2. The Court of Appeal Failed, In Fact, to Apply Strict Scrutiny In Reviewing and Approving the State's AAP.

The Department failed to show that use of racial and/or sex based classifications served a permissible interest

(serving the "operational needs" of the Department) and also failed to show that the use of these classifications was necessary for, or related to, the accomplishment of the purported interest.

The Court concluded that, after applying the standard of "strict scrutiny" required under *Bakke,* preferences in promotions and transfers of certain ethnic groups and women served the compelling interest of the State in "the proper management of its correctional system" (App. A, p. 21). The extent of "scrutiny" employed in overruling the trial court's findings consisted entirely of the following casual and conclusory remark:

> "The AAP indicated, and there was evidence, that the desired 'minority' level would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system." (App. A, p. 6).

The AAP did not indicate that a "desired 'minority' level" would serve "inmate-related objectives of the Department", nor was there any evidence to support that proposition. The court's modification of its opinion deleted the assertion that the AAP indicated any relationship between a desired minority level and the Department's objectives (App. B, p. 1), and set forth none of the supposed evidence to establish this important nexus. The substantial evidence was to the contrary, that there was no nexus between obtaining a proportional relationship between the race of the inmate population and that of employees, and the reducing of racial tensions, etc. (RT 585-586, 748-757). The evidence was that the per-

sonal behavior of the officer toward inmates, rather than his/her race, was determinative (RT 754-755). The Court of Appeal failed to advance any evidence to overturn the trial court's findings and conclusions that racial and sex based preferences in *hiring and promotion* were discriminatory (Finding 8, App. F, pp. 3-4; Conclusion of Law 4, App. F, p. 8). In fact, the Court of Appeal confused these findings with those establishing the relationship between *job assignments and job responsibilities* and a compelling state interest in "orderly and efficient prison management." (Findings of Fact 19, App. F, p. 6; Conclusion of Law 4, App. F, p. 8).[5]

The Court's "strict scrutiny" amounted to a mere assumption that if the State has a compelling interest in using race and sex in assignments and job responsibilities, then it must have a compelling interest in attaining a stated level of minority representation. A premise that the use of race or sex is permissible in determining job assignments and job responsibilities does not inevitably lead to the Court of Appeal's conclusion that a particular level of minority and female employment is necessary; there was no evidence that there was not already a sufficient number of minorities to fulfill the Department's needs with respect to assignments and responsibilities. Also, evidently, the trial court was correctly applying a more

[5]In this petition, we are not addressing the trial court's conclusion that there may be, in some instances, a compelling state interest in using race or sex for making job assignments and determining job responsibilities. The Court of Appeal confused and misinterpreted the trial court's findings which differentiated an employer's interest in the maximum efficient utilization of its work force as opposed to affirmative action for job opportunities.

rigid scrutiny with respect to employment *opportunities* than it did *assignments*. The courts have differentiated preferences granted with respect to various aspects of employment on the basis of the impact on the employment opportunities of identifiable innocent third parties (with preferences in promotional opportunities receiving the most rigid scrutiny). *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *cert. den.* 421 U.S. 991 (1975); *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. den.* 429 U.S. 823 (1976); *Chance v. Board of Examiners,* 534 F.2d 993 (2d Cir. (1976) *cert. den.* 431 U.S. 965 (1977); *White v. Carolina Paper Board Corp.,* 564 F.2d 1073 (4th Cir. 1977).

Even in Title VII cases, this court has recognized that racial remedies must be narrowly tailored to rectify the discrimination complained of. *Hazelwood School District v. United States,* 433 U.S. 299 (1977). Thus, if this court were to overlook the respondents' disclaimer of prior intentional discrimination, and were to overturn precedent by holding that disproportionate impact, the mere assertion of disproportionate impact, or judicial notice of societal discrimination suffices as a compelling state interest, the Department's AAP would still fail to pass the test of strict scrutiny, since the preferences granted bear no relation to past employment discrimination. Although the trial court took note of societal discrimination against minorities and women, it found that neither societal discrimination nor discrimination by the Department were advanced as compelling reasons for the adoption of preferential employment practices, and that such practices

were not justified by, nor did they remedy, past wrongs by society against minorities and women (Finding of Fact 13, App. F, p. 5). The Court of Appeal agreed that evidence of past discrimination was "irrelevant" to this case (App. A, p. 28).

Where there is proven past discrimination the law clearly establishes that an appropriate remedy may be fashioned to equalize the relevant labor force statistics of the protected group. *Hazelwood, supra.* In an unprecedented opinion, the California Court of Appeal chose to accept as the benchmark for goals, the inmate population of minorities, rather than the labor force statistics for minority groups. The Court chose to accept statewide employment statistics as the benchmark for goals for hiring and promoting women, as opposed to the applicant flow or labor force statistics of women in the relevant geographic areas in which institutions were located. This not only conflicts with *Hazelwood, supra,* but also it is inconsistent with precedents under Title VII, *supra,* page 15, which prohibit consideration of customer or community preference in employment decisions.

Further evidence that the state failed to narrowly tailor preferences to meet its stated objectives can be found in the Court of Appeal's observation of the casualness of the classification system. Although the Court of Appeal disagreed with the trial court that the respondents had violated procedural and substantive due process rights by having no scientific or objective basis for classifying people in racial categories and no complaint or dispute-resolution procedure, it noted that "the identification of race by surname is somewhat casual and very possibly

inaccurate (e.g., in identifying the race of a woman married to a husband with an Asian surname)" (App.A, p. 20-21). It is apparent that appointment of non-minority females married to individuals with Asian and Spanish surnames would not serve the purported needs of the Department in achieving a racial balance in the work force to reflect the racial composition of the inmate population. The record is devoid of evidence that the racial classifications used were necessary to achieve the articulated state goal. Moreover, this highlights the fact that the Court of Appeal never addressed the question of whether less intrusive means were available to attain the state's purported objectives, as required under *Kramer v. Union School District,* 395 U.S. 621 (1969), and numerous other cases.

B. The Court Erred in Relying On Weber to Hold that the Department's Practices Did Not Violate Title VII.

1. The petitioners are afforded no less protection under Title VII than under the Fourteenth Amendment.

The Court of Appeal erroneously relied upon *Weber,* in holding that the employment preferences of the Department were not violative of Title VII. The Court of Appeal ignored this court's express reluctance to extend the ruling of *Weber,* to the public sector "since the Kaiser-U.S.A. Plan does not involve state action [the] case does not present an alleged violation of the equal protection clause of the constitution." (*Weber, supra,* 99 S.Ct. 2721, 2726, 61 L.Ed. 2d 480, 487).

Title VII should be construed to incorporate the commands of the Fourteenth Amendment, since the 1972 amendments to Title VII, making the act applicable to public entities, were premised upon Section 5 of the Fourteenth Amendment, which provides that "Congress shall have the power to enforce by appropriate legislation the provisions of this article."[6] The view was confirmed by this Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) and numerous appellate courts.[7] Whatever the constitutional basis for the passage of Title VII, Congress could not, in passing the amendments to Title VII, abrogate or limit by statute the petitioners' rights under the Fourteenth Amendment. Thus, "adverse impact" is not sufficient (even if proved) since the Fourteenth Amendment requires prior intentional discrimination to be demonstrated to justify a remedy which imposes racial classifications. *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). See also, *Personnel Adm's of Massachusetts v. Feeney*, 99 S.Ct. 2282, 2292 (1979). As this Court stated in *Arlington Heights, supra*, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." At 264-265.

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[6]See Legislative History, 1972, U.S. Code Cong. & Ad. News 2154; H.R. Rep. No. 238, 92 Cong. 1st Sess. (1971); S. Rep. No. 415, 92 Cong. 1st Sess., 24 No. 11 (1971).

[7]See *United States v State of New Hampshire*, 539 F.2d 227 (1st Cir. 1976), *cert. den.* 429 U.S. 1023 (1976). *C. Usery v. Charleston School District*, 558 F.2d 1169 (4th Cir. 1977) (Equal Pay Act 29 U.S.C. § 206(b); *Usery v. Allegheny Co. Institution District*, 544 F.2d 148 (3rd Cir. 1979).

2. Under Title VII, as under the Fourteenth Amendment, remedies adopted must be the least intrusive upon the rights of innocent parties.

As previously stated, under Title VII, the intrusiveness of remedies on the rights of innocent parties must bear some relationship to the nature and quality of prior discrimination, if any, against a particular group. *Hazelwood, supra.* Blacks are the only minority group granted a preference under the affirmative action plan in *Weber.* Not only did the court take judicial notice of the specific congressional history of Title VII with respect to Negroes,[8] but also the court specifically took judicial notice of the exclusion of blacks from craft unions. 61 L.Ed.2d 480, 486. Here, the California Court of Appeal has completely ignored any differences between the congressional history of Title VII and that of the Fourteenth Amendment insofar as the preferences in this case affect other minorities and women, as opposed to blacks. Certainly those who drafted and passed the Fourteenth Amendment did not contemplate nor intend that minority persons would be better off than non-minorities insofar as treatment by state agencies were concerned.

Furthermore, the *Weber* affirmative action plan was less intrusive than the one in the instant case insofar as it was

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[8]"Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy' 110 Cong. Rec. 6548 (remarks of Senator Humphrey) . . . accordingly it was clear to Congress that 'the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them', *Ibid.* at 6548 (remarks of Senator Humphrey) and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." 61 L.Ed. 480, 488-489.

negotiated and time-limited and the preferences in *Weber* involved only employment level, and did not involve promotions and the like. One of the reasons this court was able to sanction the racial classifications imposed by the affirmative action program in *Weber* was the fact that "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber, supra,* 61 L.Ed.2d 480, 492. Not only is there no evidence that the Department's AAP is temporary, but all indications are to the contrary. In fact, the plan would not serve the interest it purports to serve if it was only temporary, since the composition of the Department's work force can not continue to mirror the racial proportions of the inmate population, if that population fluctuates. Moreover, even if the proportions of inmates in the inmate population were stable, continued vigilance and adjustment would be necessary, due to fluctuations in the Department work force with respect to both desired levels of employment as well as distribution of minorities and women in promotional positions.

In addition, the *collectively bargained* agreement in *Weber* was less intrusive upon the rights of other employees and their bargaining representative than is the voluntarily imposed AAP of the Department. In reviewing the legislative history of Title VII, the court found that the statute must be read in light of legislators' demands that "management perogatives and union freedoms . . . be left undisturbed to the greatest extent possible . . ." and that "Federal Government interference with private businesses" be minimized. 99 S.Ct., 2721, 2729, 61 L.Ed.2d 480, 491. Consequently, Title VII was designed to create an

atmosphere conducive to voluntary or local resolution of problems caused by discrimination and was intended to act as a "spur or catalyst to cause 'employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'. *Albemarle v. Moody*, 422 U.S. 405, 418 (1975)." 99 S.Ct. at 2728, 61 L.Ed. 480, 489.

Not only was the employment opportunity in *Weber* (training to facilitate the hiring of blacks) inherently less tied to the expectations of employees to promotions in a merit system (see *Chance* and *Kirkland, supra*, p. 14), but the benefit was itself a new one, negotiated by the union for all employees, in return for a modification of the seniority provisions. Under a collectively bargained plan, employees who feel that they have been denied fair representation by the labor organization on the basis of race, have redress against the employee organization. *Steele v. Louisville and Nashville Railroad*, 323 U.S. 192 (1944). Here, the Department's preferential employment plan places the entire burden of any past discrimination by society, or by the employer, on innocent male and Caucasian employees (even assuming that a showing or claim of adverse impact is sufficient). This runs contrary to the concerns expressed in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) and embraced by a strong majority in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 372 (1977). The impact of affirmative action can be shifted and benefits and burdens more easily distributed when a plan is collectively bargained as opposed to unilaterally imposed. Here the preferential practices

were not only not agreed to, but were vehemently opposed by the employee organization involved.

C. The Court Erred in Finding No Violation of California Law.

The California Court of Appeal disposed of the other California constitutional and statutory provisions by holding the United States authoritities to "provide no less individual protection than is guaranteed by California law." (App. A, p. 23). This is true, except with respect to Article I, Section 8 of the Constitution, which has been clearly held by the California Supreme Court to establish a suspect classification, where sex-based categories are concerned, holding them subject to strict scrutiny, and thereby creating greater protection for males than under the federal authorities. *Sail'er Inn v. Kirby,* 5 C.3d 1 (1971).

REASONS FOR GRANTING A WRIT

1. It is important for this court to settle the question of whether a state public employer may grant preferences in hiring and promotion, based on sex or race, where there is no evidence of past employment discrimination. That question remains open after *Weber*, and its resolution is necessary for the guidance of thousands of public employers throughout the country and to inform hundreds of thousands of public employees of all races and both sexes of what expectations they may have with regard to employment opportunities.

This case presents a harder test for the granting of racial or sex-based preferences by an employer than that used in *Weber*. That is, as indicated in our analysis of the

California Court of Appeal decision, *supra,* consistent with the Fourteenth Amendment, a *public employer's* granting of preference must pass the standards this court has enunciated where racial categorizations are concerned. To utilize racial preferences, a public employer must advance a compelling state interest subject to the strictest scrutiny and show a nexus between the interests served and the means used to achieve that interest, and the means used must also be the least intrusive on innocent parties. Mere rectification of an imbalance has been held not a sufficient interest under the Fourteenth Amendment for a public employer to justify using racial preferences. Our courts have clearly held that the public employer must show that it engaged in prior intentional discrimination and justify the use of preferences to remedy the past intentional discrimination.

This case presents an excellent record for the determination of the constitutionality of the granting of racial and sex-based preferences in public employment. In this case, it was admitted that there was no prior intentional discrimination and even if there had been, there was no relationship shown between any prior discrimination and the preferences used, since prior discrimination was not the purported interest to be served. Even if the remedying of prior discrimination was the stated objective, there is no logical relationship between any prior discrimination and the program adopted by the Department. The nexus between the stated interest and the means to achieve it (improving the efficiency of the Department by balancing the work force to reflect the racial balance of the inmate population and to reflect the balance by sex in the California state labor force) has no support in the record, is illogical,

and is not the least intrusive means of achieving the objective, even if it were logical. Thus the findings of the trial court and the record squarely present this court with the opportunity to decide whether racial and sex-based preferences can be granted where the preferences were not designed, nor intended, to remedy past discrimination.

It should be noted that the Department's system of racial preferences inures substantially to the benefit of minority groups other than blacks, since the racial proportion of various minority groups in the California state prison system is substantially higher than that in the work force in general (Exhibit G and R). Thus, in *Weber* the preferences granted were clearly related to a reasonable index of past discrimination. The emphasis in *Weber* was still on the relevant labor force, as "new trainees were to be black until the percentage of black skilled craft workers in the Gramercy plant approximated the percentage of blacks *in the local labor force.*" *Weber, supra* at 61 L.Ed.2d 480, 486.

2. Another reason for granting a writ in this case is that this case most clearly raises the issue of whether the state may support as a sufficient and compelling interest for the adoption of a system of racial preferences in job opportunities, the need to maintain a proportionate level of individuals of a particular race to the number of inmates of that race in the California Department of Corrections in order to provide a "safe and efficient correctional system" (App. A, p. 19). There is substantial authority which rejects the notion that "operational needs" of a public employer may serve as a compelling state interest.

The satisfaction of a community preference has been rejected where the community preference was for the benefit of blacks as well as Caucasians. See *Baker v. City of St. Petersburg,* etc., cited *supra,* p. 13.

3. This case most clearly raises the issue of whether different standards of scrutiny will be applied to women and to minority groups other than blacks with respect to employment preferences. The writ should be granted since no case has clearly dealt with the differences in constitutional legislative history pertaining to women and various minority groups as opposed to blacks. As stated above, the Department's preferences inure substantially to the benefit of non-black minorities.

4. It is important for this court to grant a writ in this case to fully settle the issues raised by the use of race and sex in employment opportunities by public employers. Although this court has granted a writ of certiorari in *Fullilove v. Kreps* 584 F.2d 600 (2d Cir. 1978), cert. granted, 99 S.Ct. 2403 (May 21, 1979), that case will not fully dispose of issues herein. In *Fullilove* the constitutionality of a federal statute is challenged which provided a 10% "set-aside" for minorities in construction businesses at least 50% owned by minority group members. Although the federal government is judged by a standard of strict scrutiny under the Fourteenth Amendment, that case is clearly distinguishable since the legislative history disclosed a connection between past discrimination and the "set-aside" amendment which sought to remedy it. *Fullilove* 584 F.2d 600, 605. Moreover, the Court of Appeals for the second circuit noted, "the rule for ascertaining what the

purpose of Congress was in enacting a statute that is subject to scrutiny under the equal protection clause is more deferential than the rule which would be applied to test a state statute." *Fullilove,* supra 584 F.2d 600, 604. The issue here is whether the Fourteenth Amendment, absent prior intentional discrimination, and absent any other firmly established relationship between its practices and a compelling state interest, will permit a public employer to utilize racial or sex-based categories in employment opportunity decisions to the detriment of all other innocent applicants and employees.

Additionally, this case deals with the unique and rather personal claims of individual employees, rather than, the perhaps less personal interests of corporations, companies, partnerships and contractors.

5. Even as this petition goes to the printer, we are informed that the California Supreme Court has decided *Price v. Civil Service Commission,* (S.Ct. No. SF 23836). Although we have not had time to obtain and analyze this opinion, from our understanding of the reports, the decision makes a review of the issues raised herein even more compelling. In *Price* the Sacramento County Civil Service Commission adopted a temporary system of quotas designed to remedy the disproportionate impact on minorities of Sacramento County's employment practices. There was no proof of any prior intentional discrimination. The Supreme Court remanded the case to determine whether the disproportionate impact resulted from discriminatory practices of the county.

CONCLUSION

For the foregoing reasons the Petition for a writ of certiorari should be granted, and the judgment of the California Court of Appeal reversed.

Respectfully submitted,

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(Appendices follow)

Appendices

Appendix A

In the Court of Appeal of the State of California
First Appellate District, Division Four

1 Civil 42545
(Super. Ct. No. 700048)

Wayne Minnick et al.,
Plaintiffs and Respondents,
vs.
California Department of Corrections et al.,
Defendants and Appellants.

[Filed July 27, 1979]

The California Department of Corrections and Jero J. Enomoto, its director, appeal from a declaratory judgment which states that they have violated specified constitutional and statutory provisions "by discriminating by reason of sex and by reason of ethnic background in hiring and promotion of employees" in the Department. The judgment also orders, and the court issued, a "Permanent Injunction" restraining the Department and Enomoto from engaging in certain personnel practices in the future.

The judgment was entered after a nonjury trial of the issues joined on an amended complaint filed by respondents Wayne Minnick, Henry J. Darden, and California Correctional Officers Association ("CCOA") in 1976. Because of material changes in the direction and reach of respondents' action after that, the judgment grants only part of the relief they initially sought. It also reflects an

application of the California Supreme Court's 1976 decision in the celebrated *Bakke* case. (*Bakke v. Regents of the University of California* (1976) 18 Cal.3d 34.) That decision (hereinafter cited as *"California Bakke"*) has been substantially superseded by the United States Supreme Court's resolution of the same case during the pendency of this appeal. (*University of California Regents v. Bakke* (1978) 438 U.S. 265 [*"U.S. Bakke"*].) These chronological factors, and other problems, require that the extensive record be summarzied in close detail.

The Pleadings

Respondents Minnick and Darden are male Caucasians employed by the Department as correctional officers in the State prison system. They are also members of the CCOA, a Statewide organization. These facts, and the identities of the various defendants, were alleged in the amended complaint filed in 1976. The defendants named in it included the Department and Enomoto, who was sued in his representative capacity as its director.[1]

In each of four counts pleaded in the amended complaint, respondents made conventional allegations to the general effect that Minnick and Darden were entitled to maintain the action as a class action "on behalf of themselves and on behalf of all other employees of the Department of Corrections, insofar as such employees are disadvantaged

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[1]The defendants named in the amended complaint also included Carlos Sanchez, who was similarly sued in his capacity as assistant director of the Department; the State Personnel Board; and the "State of California" as such. These parties later disappeared from the action under circumstances which need not be described, leaving the Department and Enomoto as the sole defendants and appellants.

and/or find themselves judged with regard to hiring and promotional policies on the basis of their sex and/or race."

As pertinent here, it was further alleged in each count that the named defendants (see fn. 1, *ante*) had "discriminated" againts Minnick, Darden, and other employees of the Department "on the grounds of race, national origin, and sex," in the "carrying-out" of a so-called "Affirmative Action Program"; that specified aspects of the program were not being "contested" by respondents, but that its operation had caused discriminatory treatment of Minnick and Darden in described episodes in which each had been denied promotion in his employment by reason of his race and sex and "the race and/or sex of the person actually promoted" in preference to him; that each had exhausted his administrative remedies; and that CCOA had been "damaged" by the described employment practices because they frustrated its objectives as "an organization actively opposed to racism and sexism, and working actively to increase the unity of all correctional officers . . . ." It was alleged in a perorative paragraph that Minnick and Darden had been and will continue to be "denied promotional employment opportunities . . . on the basis of their race and/or the basis of their sex" in violation of the Fourteenth Amendment of the United States Constitution, sections 7 and 8 of article I of the California Constitution, and various federal and California statutes.

According to the fair import of the allegations in the various counts, and of multiple prayers which followed them, Minnick and Darden sought mandatory injunctions requiring their promotions and the recovery of damages

in the form of back pay for the higher positions allegedly denied them. According to the same sources, all three respondents sought an award of attorneys' fees alleged as "damages" they had incurred; preliminary and permanent injunctions restraining the defendants from further carrying out of the discriminatory personnel policies alleged; and a declaratory judgment to the effect that the policies were "unconstitutional, illegal, and void."

In an answer filed in 1976 by the defendants then named in the action (see fn. 1, *ante*), they pleaded material admissions and denials and several affirmative defenses.

The Trial

Respondents obtained an "Order To Show Cause Re Preliminary Injunction" which was set for hearing in early 1976 but ordered off calendar to permit discovery proceedings. The parties later stipulated that a rescheduled hearing on it would serve as a trial of the action and that jury trial was waived. Pursuant to a bifurcation agreed upon still later, the issues of "liability" (as distinguished from "damages") were tried first. The cause was tried on these bases between August and October of 1976.

The Evidence

Testimony from more than 30 witnesses, and 58 documentary exhibits, were received at the trial. The voluminous briefs argue the consequent mass of evidence in terms of what it shows, but neither side had adequately summarized it. The record supports the following recitals, which will suffice for purposes of this appeal:

The Department adopted a documented "Affirmative Action Plan" (hereinafter "AAP") in 1974. Its preamble states in pertinent part that the Department's "policy" is "to provide equal employment opportunities for all persons on the basis of merit and fitness and to prohibit discrimination based on race, sex, color, religion, national origin, or ancestry in every aspect of personnel policy and practices in the employment . . . and treatment of employees." According to its terms, the principal objectives of the AAP include (1) increasing the number of female employees in the Department to a percentage level equivalent with that in the total "California labor force" in April, 1970, and (2) increasing the number of "minority" employees to a level equalling at least 70! of any given "minority" in the inmate population of the Department (i.e., State prisoners).

The projected increases were variously broken down and allocated among segments of the Department and specified ethnic "minority" groups (defined as "Black," "Asian," "Spanish surname," "Native American," and "other extraction"), but they respectively translated into "overall" goals of "38% women employed" and "36% minorities employed." The AAP indicated, and there was evidence, that the desired "minority" level would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system.

The percentage of female and minority employees in the Department were markedly below those projected in the AAP when it was adopted. The attainment of both percent-

ages was targeted to be reached by July, 1979. Although their realization was consequently directed to the hiring of new female and minority employees, the AAP provided that the underlying policy of nondiscrimination was to be applied in all areas involving the promotion, transfer, training, and work assignments of Department personnel.

There was evidence that various male Caucasian employees had been denied promotion or transfer in instances where preferences had been given to female or minority members. Proof presented by respondents Minnick and Darden supported the inference that each had been denied promotion in deference to a female or minority candidate, and it was shown that each had pursued a "grievance" to the State Personnel Board without success. It was also established, however, that neither had been eligible for promotion under conventional civil service rules which applied irrespective of the AAP or its implementation.

Various supervisory employees of the Department testified that preference for promotion or transfer was *not* given to female or minority employees in specified segments of the Department after 1974. There was thus a conflict in the evidence as to how widely the preferential policies expressed in the AAP had been pursued within the Department. According to all the evidence of instances where they had been applied, "preference" was given to female sex or minority status only to the extent that each was considered a "plus" factor in the assessment of a particular employee for promotion or transfer. Some evidence supported the inference that this "plus" had occasionally contributed to the promotion or transfer of the preferred employee ahead of nonpreferred candidates who were

otherwise more qualified for the new position. There was no evidence that such "preference" had ever resulted in the promotion or transfer of an employee who was *not* qualified to hold the position.

Vacancies in specific positions were occasionally left open, and promotions or transfers to them were sometimes delayed, until qualified female or minority employees could be found to fill them. Some of these positions were labelled "female only," or with words similarly referring to sex (including "male only") or to race or ethnic background. There was no evidence that any specific number or percentage of positions were reserved for members of either sex or of any racial or ethnic group.

In response to an interrogatory, the Department in effect denied that it had "wilfully, with a specific intent, engaged in illegal and/or improper discrimination against any person with regard to employment opportunities . . . on the basis of a person's race, color, creed, sex or national origin." It added, " . . . however, that as a result of its past hiring and promotion practices and procedures, there has been an adverse discriminatory impact on certain minorities and the female sex in terms of initial hiring and also promotion." This statement was the only substantial reference in the evidence to the effect that the Department's personnel practices had discriminated against females and minorities in the "past." The exercise of "preference" in their favor in recent years, as described above, was limited to cases involving the promotion, transfer, or work assignment of employees only. There was no substantial evi-

dence of any instance in which it had been exercised in the "initial hiring" of a new employee.

Post-Trial Proceedings

The cause was submitted on November 23, 1976. On January 5, 1977, the trial court filed a memorandum decision indicating its intention to grant injunctive relief to respondents, stating its reasons, and directing respondents to prepare an appropriate order and findings of fact and conclusions of law. Protracted proceedings followed, during 1977, before findings were settled and signed. The pertinent events were these:

On February 28, the court made an order granting and issuing the equivalent of an injunction pendente lite which restrained the Department and Enomoto from performing any act of "hiring or promoting any employee in the Department . . . in which preference is given to race, color, sex, or national origin until the further order of this court."[2]

In April, the Department and Enomoto moved for an "order augmenting the record" to include a massive array of sworn declarations and other documents for the purpose of showing that the AAP had been "designed to rectify" past personnel practices which had operated to discriminate on racial and other grounds.[3] The motion was orally denied at a hearing conducted on May 5.

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[2]The Department and Enomoto joined in an appeal taken from this order on March 4. That appeal was never perfected, and the briefs on this one do not mention it. For these reasons, and for recordkeeping purposes, we hereinafter dismiss it.

[3]Respondents moved "in the alternative" for an order "reopening the case for further evidence of the past discriminatory practices

In June, respondents moved for an order certifying their action as a class action. At a hearing on this motion in July, the court indicated its view that respondents Minnick and Darden were not entitled to damages, nor to maintain a class action for damages because they had not shown that they had been denied promotion by reason of the discriminatory personnel practices alleged. The court nevertheless stated that it had perceived such practices to exist, and that it desired to grant declaratory relief against them. A discussion followed as to whether Minnick, Darden and CCOA still had "standing" to obtain that relief in the action. The court accepted a stipulation that they did, denied the motion for certification, and ruled "money damages" out of the case.[4] On August 2, the court made formal orders denying the motion for certification and the Department's and Enomoto's motion for an order augmenting the record.

The Findings and Judgment

The thus-narrowed issues in the action were resolved in the findings of fact and conclusions of law, which were settled after lengthy hearings. The trial court signed and filed them on October 11, 1977. The declaratory judgment

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which the . . . Affirmative Action Plan was designed to rectify." On the alternative motion, the accompanying declarations and other documents were presented as an offer of proof.

[4]The court stated in these respects as follows: "Then it's stipulated or conceded that the individual plaintiffs in this action [Minnick and Darden] and the Association [CCOA] . . . have standing in this action, and that the court has *jurisdiction* in the matter to the extent that if the testimony and evidence will support it, to grant injunctive relief that would preclude the Department from in any manner, shape, or form, discriminating against or in favor of anyone in that Department by reason of race, color, place of origin, sex, and so on. . . . I will make a ruling that I'll not grant you your motion to consider this a class action, and I will deny your seeking monetary damages." (Emphasis added.)

and the "Permanent Injunction" were entered the next day.

The pertinent findings (nos. 8, 10, 13, 16 and 19) are quoted in the margin.[5] Two of the conclusions of law were

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[5]"8. Defendants Department . . . and Jeri J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department. In so doing, the defendants were motivated at least in part by . . . [the] . . . Affirmative Action Plan. . . . In so doing, preferences result in favor of certain ethnic groups, or in favor of one sex to the detriment of the other, and not *solely* on the qualifications of the individuals involved, or their merits." (Emphasis added.)

"10. All employees of the Department, including the plaintiff[s] . . . Minnick and . . . Darden, have been discriminated against by reason of their race."

"13. There has been long standing discrimination against minorities and women by our society. However, the acts complained of in . . . [this] . . . action are not justified by, nor do they remedy, past wrongs by society against any such minorities or women. Furthermore, the acts complained of, and more particularly described in these Findings of Fact and Conclusions of Law, operate to the detriment of innocent employees of the Department who played no role in any previous discrimination by portions of our society."

"16. Defendants have no scientific or objective basis whatsoever by which they classify people into one racial category or another, for purposes of granting preferences or imposing detriments concerning job opportunities with defendants. Defendants have no dispute-resolution procedure by which a person seeking to be placed in one category, instead of another, can complain, or by which a person complaining of the categorization of another person may complain."

"19. The unique and sensitive nature of the functions of the Department . . . and the peculiar difficulties inherent in the administration of California's prison system require the Department to exercise broad discretion in making job assignments and in determining the employment responsibilities of its employees. Because of the conditions and circumstances within California prisons and throughout the Department . . . , it is necessary for the Department to consider, among other factors, the composition of the existing work force and of the inmate population, and the race and sex of employees, in order to serve the *compelling state*

substantially copied into paragraphs of the judgment which read as follows:

"1. Defendants . . . Department . . . and . . . Enomoto, by discriminating by reason of sex and by reason of ethnic background in hiring and promotion of employees . . . , have violated and are continuing to violate [1] the Fourteenth Amendment to the United States Constitution, [2] Article I, Sections 7 and 8 of the California Constitution, [3] Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq., [4] 42 U.S.C. §§ 1981 and 1983, [5] California Labor Code § 1410 et seq., and [6] California Government Code § 50084.

". . .

"3. Defendants . . . , by engaging in employment practices above-described and by the arbitrary and capricious nature of the racial categorization process (as particularly described in the Findings of Fact and Conclusions of Law) utilized by said defendants, have deprived and are continuing to deprive employees in the Department . . . of substantive and procedural due process of law within the meaning of both the Fourteenth Amendment to the United States Constitution and within the meaning of Article I, Section 7 of the California Constitution."[6]

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interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." (Emphasis added.)

[6]The constitutional and statutory provisions cited in paragraph 1 (which is here quoted with some corrective editing and our numbers added) were those cited in respondents' amended complaint as later amended again. Paragraphs 1 and 3 of the judgment incorporated the substance of the trial court's conclusions of law nos. 2 and 3, respectively. Its conclusion of law no. 1 stated that "[p]laintiffs [respondents] are entitled to injunctive relief."

In a trailing provision of the judgment, the court ordered that "[a] Permanent Injunction attached hereto, marked Exhibit 'A' and incorporated herein by reference, be issued in this case." The "Permanent Injunction" was thereupon signed and issued by the court, and entered on October 12, 1977, as a separate document.[7]

The Appeal

The Department and Enomoto filed a notice of appeal on October 14, 1977, stating that they appeal from the judgment and the "Permanent Injunction." They subsequently petitioned this court for a writ of supersedeas. We granted the petition and entered an order staying enforcement of the judgment and the "Permanent Injunction" pending determination of the appeal.

REVIEW

Paragraph 1 Of The Judgment

This paragarph is to be reviewed, separately, in light of the successive constitutional and statutory provisions

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[7]The document is addressed to the Department, Enomoto as its director, "their officers, agents, servants and employees, and all persons acting in concert with them." It opens with recitals which refer to the trial of the action and to "good cause appearing" for the following language: "IT IS HEREBY ORDERED that . . . [the addresses] . . . shall be, and they hereby are, enjoined and restrained from engaging in . . . any and all of the following acts: [¶] (1) From hiring or promoting any employee in the Department . . . in which [*sic*] preference, advantage, or benefit is given to race, color, sex, or national origin. [¶] (a) Provided, however, that nothing in this order shall prevent any person, in determining the assignments and job responsibilities of employees of the Department . . . , from considering, among other relevant factors, the race and sex of the employees in question. [¶] (b) Provided, however, 'male only,' 'female only,' and bi-lingual certifications may be requested and/or granted when the job-related aspect of the certification can be objectively and demonstrably shown and established. . . ."

it declares the Department and Enomoto to have "violated." (See the judgment as quoted in the text at fn. 6, *ante.*)

The Equal Protection Clause
Of The Fourteenth Amendment

Although the first citation in paragraph 1 refers only to "the Fourteenth Amendment to the United States Constitution," it is undisputed that the reference is to the Equal Protection Clause.[8] The *Bakke* litigation and its overlapping chronology are pertinent for this reason. The California Supreme Court decided *Bakke* on September 16, 1976 (*California Bakke, supra,* 18 Cal.3d at p. 34), during the trial of this case and a full year before it was decided in 1977. The superseding decision of the United States Supreme Court emerged on June 28, 1978 (*U.S. Bakke, supra,* 438 U.S. at p. 265), several months after this appeal was taken.

Both decisions require discussion, but neither of them need be analyzed at length. Both courts ordered the plaintiff admitted to a medical school operated by the University of California after he had successfully challenged its "special admission program." (*California Bakke, supra,* 18 Cal. 3d at pp. 63-64; *U.S. Bakke, supra,* 438 U.S. at pp. 281, 320.) A formula employed in the program effectively limited eligibility for 16 student seats at the school (out of 100) to applicants who were members of specified racial

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[8]The clause appears in its context as follows: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.*" (U. S. Const., 14th Amend., § 1 [emphasis added].)

or ethnic minorities. (*U.S. Bakke, supra,* 438 U.S. at pp. 273-275.)

The California Supreme Court held that a "strict scrutiny" test was to be applied because of the racial classification thus effected (*California Bakke, supra,* 18 Cal. 3d at pp. 49-50), found from its application that the program violated the Equal Protection Clause because the rigid and exclusive racial quotas employed in it served no compelling governmental interest not obtainable by less intrusive means (*id.,* at pp. 52-62), and produced a result which we may treat in two parts. Part 1 declared the program unconstitutional under the Equal Protection Clause. (*Id.,* at pp. 62-63.) Part 2 effectively enjoined the University from giving *any* consideration to the race of an applicant seeking admission to the medical school. (See *id.,* at pp. 55, 61-63; *U.S. Bakke, supra,* 438 U.S. at pp. 279, 320.)

In reviewing parts 1 and 2, all nine members of the United States Supreme Court substantially agreed that the racial classification in the program was "suspect" for equal protection purposes and that the "strict scrutiny" test was accordingly to be applied in determining whether the program served a compelling governmental interest. (*U.S. Bakke, supra,* 438 U.S. at pp. 287-305, 355-362.) Five members thereupon joined in affirming part 1. (*Id.,* at pp. 271, 319-320.) One of these five (Justice Powell) joined four other members in a net result which reversed part 2. (*Id.,* at pp. 272, 320, 325-326, 379.)

The present trial court had meanwhile followed the all-inclusive proscription of part 2 when it found and declared, in 1977, that the Department and Enomoto had

"violated" the Equal Protection Clause by extending "preferences" to employees based on race or sex. (See finding no. 8 in fn. 5, *ante.*) Its application of part 2 at that time was entirely proper, but the question now is whether the declaration may stand in light of *U.S. Bakke.* We hold that it cannot.

Justice Powell's opinion in *U.S. Bakke* establishes the reasoning and guidelines under which consideration may be given to the race or ethnic background of an applicant for admission to a State-operated *school* reached by the Fourteenth Amendment. (See *U.S. Bakke, supra,* 438 U.S. at p. 287.) Such consideration is permitted by the Equal Protection Clause because it is necessary to promote the "compelling" interest of the State in attaining "ethnic diversity" among the school's students. (*Id.,* at pp. 311-315.) The Clause nevertheless requires a school pursuing that objective to do it in such way that (1) ". . . race or ethnic background may be demed a 'plus' in a particular applicant's file, yet . . . does not insulate the individual from comparison with all other candidates for the available seats"; and (2) a candidate not credited with that "plus" will be "fairly and competitively" evaluated for all the seats without being "totally excluded from a specific percentage" of them which has been restricted to a particular racial or ethnic group. (*Id.,* at pp. 316-319.)

This language closely fits the Department's personnel practices challenged here. In its finding no. 19, the trial court effectively determined that the practices apply the prison-related realities of race and sex to the point of promoting a "compelling state interest" in a safe and efficient

correctional system. (See fn. 5, *ante.*) The finding is supported by the evidence. The "interest" mentioned in it lacks the constitutional basis of the University of California's interest in attaining "ethnic diversity" among its students (see *U.S. Bakke, supra,* 438 U.S. 265 at p. 313), but safety and efficiency in the prisons of the same State are no less "compelling." The Department is pursuing those objectives by assigning a female or minority employee a "plus" in competition for promotion or transfer. The qualifications of other employees in the competition are still "weighed fairly and competitively." (See *id.,* at pp. 317-318.)

The Department's AAP refers to the realization of "38% women employed" and "36% minorties employed" within five years. This language sounds in "quota" terms, but neither percentage figure bespeaks a "quota" of the type proscribed in Justice Powell's opinion in *U.S. Bakke.* Each is an optimum "quota" to the extent that it defines a goal to be attained in the future. Neither is a functional "quota" which now operates to place either—or any—percentage of positions in the Department beyond the reach of male or nonminority employees. (Compare *U.S. Bakke, supra,* 438 U.S. 265 at pp. 275, 319.) The distinction was recognized in finding no. 19, where the trial court found partial *motivation* for the Department's practices in the AAP but *discrimination* in the practices alone. (See fn. 5, *ante.*) The "Permanent Injunction" restrains certain aspects of the practices but not the implementation of the AAP as such. (See fn. 7.)

The terminal question is whether this record supports the declaration, in paragraph 1 of the judgment, that the Department and Enomoto violated the Equal Protection Clause by "discriminating" on the bases of race and sex in the "hiring and promotion of employees." The declaration rests on the trial court's finding (no. 8) that they had "discriminated" in those respects by applying personnel practices from which "preferences result in favor of certain ethnic groups or . . . of one sex." (See fn. 5, *ante*.) According to our review of the evidence, it does not support a finding that "preferences result" from the practices in favor of males or in the "hiring" of employees. Finding no. 8 therefore fails to support the declaration in either respect.

The practices otherwise identified in the finding have just been examined in light of *U.S. Bakke* and under the "strict scrutiny" it commands. We conclude that they are permitted by the Equal Protection Clause within the limited extent that noncontrolling "preferences result in favor of certain ethnic groups" for purposes of promotion or transfer of personnel within the Department, because they are necessary to promote the compelling interest of this State in the proper management of its correctional system. For the same reasons, they are permitted insofar as the same limited "preferences result" in favor of women. Finding no. 8 accordingly fails to support the declaration that the Department and Enomoto violated the Equal Protection Clause in any respect.

We move to other constitutional and statutory violations charged in paragraph 1 of the judgment. We preliminarily

observe from the record that the trial court placed almost exclusive emphasis on the violation of the Equal Protection Clause it declared first, and that the others trailed it into paragraph 1 in the form of little more than an omnibus recital. We may examine them more briefly for that reason.

The California Constitution

The court further declares in paragraph 1 that the Department and Enomoto, "by discriminating . . . ," have violated article I, sections 7 and 8, of the California Constitution.[9] Again, the record demonstrates that the reference to section 7 is to its equal protection language alone. (See fn. 9, *ante*.) The reference excludes the declaration from the reach of *U.S. Bakke* because the constitutional issues raised in that case were decided under the corresponding provisions of the Fourteenth Amendment. (*U.S. Bakke, supra,* 438 U.S. 265 at pp. 271, 320.)

Decisions of the United States Supreme Court defining "fundamental civil rights" under the federal Constitution "are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." (*People v. Longwill* (1975)

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[9]These sections respectively provide:

"7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

"(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

"8. A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

14 Cal.3d 943, 951, fn. 4; *Serrano v. Priest* (1976) 18 Cal.3d 728, 764.) Respondents have asserted "fundamental civil rights" in this action, but we are not persuaded that the rationale of *U.S. Bakke* provides them with "less individual protection than is guaranteed by California law." Under that rationale, the evidence does not support the declaration that section 7 of article I has been violated.

Section 8 of article I does not parallel a literally equivalent provision in the federal Constitution. Respondents Minnick and Darden, and other employees of the Department who claim to be disaffected by its preferential personnel practices, are "pursuing . . . employment" within the meaning of section 8. (See fn. 9, *ante.*) The limited "preferences" given to certain employees, for purposes of promotion and transfer, are based on "race" and "sex" within the same meaning. The "preferences" do not exclude others from eligibility for promotion or transfer, nor from having their own qualifications "weighed fairly and competitively" in the process. (See *U.S. Bakke, supra,* 438 U.S. 265 at pp. 317-318.) None of them is "disqualified" in any respect within the meaning of section 8. The evidence does not support the declaration that the section has been violated.

Federal Statutes

Paragraph 1 declares a violation of "Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)" of "42 U.S.C. §§ 1981 and 1983." Title VII does not reach the Department, a public employer, because it was enacted by the Congress "pursuant to the Commerce power to regulate

purely private decisionmaking . . . ." (*United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979) ..... U.S. ....., ... [47 U.S.L.Week 4851, 4854-4855], fn. 6.)

"42 U.S.C. §§ 1981 and 1983" are vintage statutes which operate to guarantee a civil remedy for violations of the Fourteenth Amendment. (See *Monroe v. Pape* (1961) 365 U.S. 167, 170-172; *Rizzo v. Goode* (1976) 423 U.S. 362, 370-371.) They have no application here. The declaration that the Department and Enomoto "violated" any of these statutes is erroneous.

State Statutes

Paragraph 1 declares violations of "California Labor Code § 1410 et seq." (the California Fair Employment Practices Act) and "Government Code § 50084." Respondents state that they "agree" that these statutes "provide no greater legal bases for stating a cause of action than do the Equal Protection Clauses of the United States and California Constitutions and Title VII of the Civil Rights Act of 1964." Our disposition of the points raised on these various sources therefore disposes of this one. Government Code section 50084 is inapplicable for the additional reason that it requires the employment practices of a "local agency" to conform to the Civil Rights Act of 1964. Neither the Department nor Enomoto is a "local agency" for purposes of this statute. (See Gov. Code, § 50001.)

Paragraph 3 Of The Judgment

This paragraph declares that the Department and Enomoto have deprived employees in the Department "of substantive and procedural due process of law within the meaning of both the Fourteenth Amendment to the United

States Constitution and Article I, Section 7 of the California Constitution." The reference unmistakably cites the due process clauses of both sources. (See fns. 8 and 9, *ante.*) The declaration rests on the trial court's finding no. 16 (quoted in fn. 5), relative to procedural deficiencies involving the Department's classification of employees by race and their opportunity to challenge a racial classification by way of administrative review. (See *ibid.*)

The deficiencies found were not challenged by respondents in this action. Finding no. 16 was made, at the trial court's insistence, after it had been shown that racial classifications were made on the basis of employees' surnames. The reference in the declaration to the "arbitrary and capricious nature" of this procedure derives from observations in the record that the identification of race by surname is somewhat casual and very possibly inaccurate (e.g., in identifying the race of a woman married to a husband with an Asian surname). The observations are valid, but the finding and declaration are not. There is no evidence showing that the asserted deficiencies have ever produced an erroneous racial classification *in fact,* nor that any person has been aggrieved by them *in fact.* If the evidence dimly supports finding no. 16, the finding itself does not support the declaration that anyone has been denied due process of law. The declaration is accordingly erroneous.

* * * * *

The declarations in paragraphs 1 and 3 of the judgment are thus unsupported by the record. Its other provisions are strictly ancillary to those paragraphs. We reserve it accordingly.

* * * * *

The "Permanent Injunction"

Although the issuance of this injunction was expressly ordered in the trailing provision of the judgment quoted above, it emerged as a separate document in a format reciting "good cause" for its injunctive language. (See fn. 7, *ante.*) These factors make it independently appealable as an "order granting . . . an injunction" (Code Civ. Proc., § 904.1, subd. (f)) [sic], but it will not stand by itself. Although the exceptions stated in it ("Provided, however") appear to make allowance for recognition of employees' race and sex in the Department's work assignments, its express injunction against giving "advantage" or "benefit" to race or sex would prohibit the competitive "plus" now given to some female or minority employees under consideration for promotion or transfer. Because *U.S. Bakke* permits the "plus," the injunctive language is overbroad in itself.

It is also based on the trial court's conclusion of law that respondents were "entitled to injunctive relief" against the personnel practices deemed to have "violated" the law as declared in the other conclusions of law and in the judgment. (See fn. 6, *ante.*) Because we have now held that they have not "violated" the law, the injunction must fall with the judgment. We reverse it.

The Motion To Augment Or Reopen

The Department and Enomoto made this motion, five months after the case had been submitted for decision, for the purpose of proving past discrimination by the Department on the bases of race and sex. (See the text at fn. 2, *ante.*) In ordering it denied, the trial court remarked that it was "irrelevant." That characterization was not given it

in the formal order denying it, but the reasons the court deemed it "irrelevant" were later stated in finding no. 13. (See fn. 5.)

The court did not abuse its discretion in denying the motion, which was made by afterthought and much too late. We need not decide the relevance of the evidence offered, nor the validity of finding no. 16. If the case is to be retried, Justice Powell's decision in *U.S. Bakke* will be pertinent to the determination of either question. (See *U.S. Bakke, supra,* 438 U.S. 265 at pp. 307-310.)

Respondents' "Standing"

There is no claim of error in this regard, but we perceive problems with respondents' "standing" which will recur if the case is to be retried. The problems appeared when they moved for an order certifying their action as a class action after it had been recognized that respondents Minnick and Darden were not entitled to damages or injunctive relief as individuals. The motion was denied when the parties stipulated that all three respondents had "standing" to obtain declaratory relief, and that the trial court had "jurisdiction" to grant it. (See fn. 4, *ante.*)

Although respondents were not permitted to proceed in a class action, the results had the dimensions of class relief. There is a real question whether Minnick and Darden may act as representatives of other employees if they are not entitled to relief as individuals. Another question is whether all employees in the Department may be represented by the CCOA, whose membership is apparently limited to correctional officers only. If their "standing" to proceed with the litigation could be conferred by stipula-

tion, the trial court's *jurisdiction* could not. (1 Witkin, California Procedure (2d ed. 1970) Jurisdiction, § 10, pp. 534-536.) These problems require examination if the case is to be retried.

The appeal purportedly taken on March 4, 1977, is dismissed. The "Judgment And Declaratory Judgment" and the "Permanent Injunction" entered on October 12, 1977, are reversed. The stay order made by this court on November 4, 1977, is vacated.

CERTIFIED FOR PUBLICATION.

Rattigan, J.

We concur:

Caldecott, P. J.

Christian, J.

Appendix B

Court of Appeal of the State of California

First Appellate District

Division Four

No. 42545

Wayne Minnick et al.,
Plaintiffs and Respondents,

vs.

California Department of Corrections et al.,
Defendants and Appellants.

[Filed August 23, 1979]

BY THE COURT:

The typewritten opinion filed herein on July 27, 1979, is modified as follows:

On page 6, strike lines 17, 18, and 19, and insert: "38% women employed" and "36% minorities employed." There was evidence that the attainment of these goals would serve inmate-related objectives of

On page 24, strike the eight-line paragraph commencing with the words "Paragraph 1 declares" and insert the following two paragraphs in its place:

It is further declared in paragraph 1 of the judgment that the Department and Enomoto, "by discriminating

. . . ," have violated federal statutes cited as "Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)" and "42 U.S.C. §§ 1981 and 1983." As amended, Title VII of the Civil Rights Act of 1964 effectively prohibits discrimination by an "employer," in any area of nonexcepted employment (see 42 U.S.C. § 2000e-1), on the basis of an "individual's race, color, religion, sex, or national origin." (*Id.*, § 2000e-2, subd. (a).) The prohibition reaches the Department, a public employer, as well as private employers. (*Id.*, § 2000e, subds. (a), (b); *Dothard v. Rawlinson* (1977) 433 U.S. 321, 331-332, fn. 14.)

U.S. Bakke did not involve Title VII as such, but a clear majority of the United States Supreme Court has since held, on the basis of the congressional intent underlying the title, that it does not prohibit *private* employers from voluntarily adopting "race-conscious affirmative action plans." (*United Steelworkers of America, AFL-CIO-CLC v. Weber et al.* (1979) ..... U.S. ....., ...-..... [99 S.Ct. 2721, 2727-2730].) The Department has done precisely that, and the trial court found from substantial evidence that the plan it adopted had partially "motivated" the personnel practices challenged in this action. (See finding no. 8, quoted in fn. 5, *ante*.) The fact that the Department is a public employer suggests no basis for excluding it from the reach of the congressional intent and objectives analyzed in *United Steelworkers*. We accordingly perceive no violation of Title VII in the practices the Department's AAP has "motivated." The contrary declaration in paragraph 1 of the judgment is erroneous.

On Page 24, strike the last two lines and insert: Department and Enomoto "violated" either of them is erroneous.

The petition for rehearing is denied.

Dated August 23, 1979

Caldwell, P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Nov. 8 1979

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 42545

Minnick

vs.

California Department of Corrections

Respectfully,

G. E. BISHEL
Clerk

Appendix D

Superior Court of the State of California
for the City and County of San Francisco
Department X2

[Filed Jan. 5, 1977]

January 5 1977

No. 700 048

Wayne Minnick and
Henry J. Darden, et al.

Plaintiff.

vs.

California Department of Corrections: Jeri J. Enomoto, Director of the California Department of Corrections; State Personnel Board of the State of California

Defendant.

Notice of Intended Decision

The testimony and documentary evidence herein show, and defendants admit, that defendants have carried on a campaign to, and they do now, select applicants for employment and for promotion based on their sex and on their racial background or ancestry.

Defendants seek to justify their actions on the basis that while the sex of an applicant is *one* of the factors considered, the applicant must be otherwise qualified for the

duties to be performed. Sex or racial background is not the *sole* factor considered. Plaintiffs on the other hand assert that the hiring or promotion of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void.

The Court agrees with plaintiffs.

Let a Writ issue directing that defendants, their agents and employees are enjoined and precluded from considering as a factor for employment or for the promotion of a candidate his sex, race or national origin.

Counsel for plaintiffs will prepare an appropriate order and will prepare Findings of Fact and Conclusions of Law consistent with the foregoing.

Dated: January 5, 1977.

/s/ Byron Arnold

Judge

MINUTE ORDER

Appendix E

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Attorneys for Plaintiffs

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 700 048

Wayne Minnick, et al.,
Plaintiffs,
vs.
California Department of Corrections, et al.,
Defendants.

[Filed Oct. 11, 1977]

Judgment and Declaratory Judgment

The above-entitled matter came on regularly for trial, which trial commenced on August 23, 1976. The trial was concluded in October, 1976. The parties submitted Post-Trial Briefs, and oral argument was held subsequent to the submission and consideration of same on November 23, 1976.

Additional hearings were held related to motions filed by the parties and the scope of relief to be granted by this Court.

The Court having heard the testimony, received the oral and documentary evidence, and having considered oral and written arguments offered by the respective parties, and having made its Findings of Fact and Conclusions of Law, and good cause appearing:

IT IS THE DECLARED JUDGMENT OF THIS COURT that:

(1) Defendants California Department of Corrections and Jeri J. Enomoto, by discriminating by reason of sex and by reason of ethnic background in hiring and promotion of employees in the California Department of Corrections, have violated and are continuing to violate the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, Article 1, Section 7 and 8 of the California Constitution, 42 U.S.C. §§ 1981 and 1983, California Labor Code § 1410 *et seq.*, and California Government Code § 5084.

(2) This Court has jurisdiction to grant relief under each of the above-quoted constitutional provisions and/or pieces of legislation.

(3) Defendants California Department of Corrections and Jeri J. Enomoto, by engaging in employment practices above-described and by the arbitrary and capricious nature of the racial categorization process (as particularly described in the Findings of Fact and Conclusions of Law) utilized by said defendants, have deprived and are con-

tinuing to deprive employees in the Department of Corrections of substantive and procedural due process of law within the meaning of both the Fourteenth Amendment to the United States Constitution and within the meaning of Article 1, Section 7 of the California Constitution.

IN ADDITION, IT IS HEREBY ORDERED that:

(1) A Permanent Injunction, attached hereto, marked Exhibit "A" and incorporated herein by reference, be issued in this case.

(2) Plaintiff's shall recover their costs in this action.

(3) Plaintiffs shall receive attorneys' fees in a sum to be specified in the Memorandum of Costs and Disbursements to be filed herein, subject only to any exceptions that may be filed and sustained as to the amount thereof.

Dated: October 11, 1977

/s/ Byron Arnold
Judge of the Superior Court

Approved as to form:

Howard, Prim, Rice, Nemerovski,
Canady & Pollak
A PROFESSIONAL CORPORATION

By /s/ STUART R. POLLAK Dated: October 11, 1977
Stuart R. Pollak
Attorneys for California
Department of Corrections and
Jeri J. Enomoto

Approved as to form:

Office of the
Attorney General

By /s/ GORDON ZANE Dated: October 11, 1977

Gordon Zane
Attorneys for the State
Personnel Board and State of
California

Approved as to form:

Carroll, Burdick & McDonough

By /s/ RONALD YANK Dated: October 11, 1977

Ronald Yank
Attorneys for Plaintiffs

Appendix F

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In the Superior Court of the State of California
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No. 700 048

Wayne Minnick, et al.,
Plaintiffs,

vs.

California Department of Corrections, et al.,
Defendants.

[Filed October 11, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came regularly on for trial on August 25, 1977. The trial proceeded before the Court sitting without a jury, a jury having been waived by the parties. Ronald Yank of Carroll, Burdick and McDonough appeared as attorneys for plaintiffs, and Gordon Zane, Deputy Attorney General, appeared as attorneys for de-

fendants. In February, 1977, Stuart Pollak of Howard, Prim, Rice, Nemerovski, Canady and Pollak, were substituted as counsel for defendants California Department of Corrections and Jeri J. Enomoto, Director of the California Department of Corrections.

The Court, having heard the oral testimony, having received the oral and documentary evidence, and having considered oral and written arguments offered by the respective parties, and having issued its NOTICE OF INTENDED DECISION, filed herein on January 5, 1977, and being fully advised in the matter, makes the following FINDINGS OF FACT.

Findings of Fact

(1) At all times herein pertinent plaintiffs Wayne Minnick and Henry J. Darden, and each of them, were employees of the Department of Corrections of the State of California. They are caucasian males.

(2) At all times herein relevant, plaintiff California Correctional Officers' Association (hereinafter referred to as "CCOA"), was and is an "employee organization" within the meaning of California Government Code §3526, and was and is a recognized agent of correctional officers and some other employees of defendants for purposes of representing those employees in all matters relating to employment conditions and employer-employee relations, including but not limited to wages, hours, and other terms and conditions of employment, all within the meaning of California Government Code § 3525, *et seq.*

(3) Plaintiff CCOA has fairly and adequately represented the interests of its members who have been, are being, or will be disadvantaged by the employment practices hereinafter described.

(4) At all times herein relevant, defendant California Department of Corrections was and is an agency of the State of California entrusted with the official responsibility of custody of persons convicted of crimes under California law and sentenced to terms in California correctional facilities. The Department of Corrections (hereinafter "Department") carries out its responsibilities at least in part pursuant to California Penal Code § 5000, *et seq.*

(5) At all times herein relevant, defendant Jeri J. Enomoto was and is Director of the California Department of Corrections, and was and is entrusted with the official responsibility of the statewide administration of California correctional facilities, including the hiring, promotional, and other job opportunity procedures for the Department.

(6) At all times herein relevant, defendant State Personnel Board (hereinafter "SPB") was and is an agency of the State of California, entrusted with the official responsibility of overseeing and administering the manner in which various agencies of the State of California hire and promote employees of those agencies. The SPB is entrusted with administering and overseeing the Civil Service System by which appointments and promotions are made in agencies of the State of California.

(7) Defendants Department of Corrections, Jeri J. Enomoto, and the SPB have all been served in this action, and have appeared in this action through counsel.

(8) Defendants Department of Corrections and Jeri J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department. In so doing, the defendants were motivated at least in part by an Affirmative Action Plan, adopted effective July 1, 1974. A copy of that Plan is defendants' Exhibit "G" in evidence. The Affirmative Action Plan was revised effective April 1, 1975. A copy of the revised Affirmative Action Plan is Exhibit "R" in evidence. In so doing, preferences result in favor of certain ethnic groups, or in favor of one sex to the detriment of the other, and not solely on the qualifications of the individuals involved, or their merits.

(9) There are certain aspects of the Department's affirmative action program which are not contested by plaintiffs herein. Those include such matters as aggressive recruiting measures, education for all personnel, including supervisors in charge of hiring, firing, and promotions, and special training classes for certain applicant groups and/or Department employees potentially interested in promotional opportunities.

(10) All employees of the Department, including the plaintiff Wayne Minnick and the plaintiff Henry J. Darden, have been discriminated against by reason of their race.

(11) Plaintiffs Minnick and Darden completed whatever exhaustion of administrative remedies might be required by processing their grievances to and through the SPB.

(12) Unless restrained by order of this Court, defendants the Department of Corrections and Jeri J. Enomoto will continue the discrimination described herein.

(13) There has been long standing discrimination against minorities and women by our society. However, the acts complained of in the above-entitled action are not justified by, nor do they remedy, past wrongs by society against any such minorities or women. Furthermore, the acts complained of, and more particularly described in these Findings of Fact and Conclusions of Law, operate to the detriment of innocent employees of the Department who played no role in any previous discrimination by portions of our society.

(14) Plaintiffs Minnick and Darden, and other employees, will be affected by future implementation of the employment practices described herein, with regard to job opportunities with the Department.

(15) Plaintiffs, and other employees in the work force of the Department, have no plain, speedy or adequate remedy at law other than the relief prayed for in documents filed with this Court, with regard to future job opportunities. Plaintiffs, and other employees employed by the Department, have suffered, and will continue to suffer, irreparable injury and damage in their employment opportunities, in that they, and each of them, have been and will continue to be denied job opportunities and employment with the Department should the Department action as described herein not be enjoined.

(16) Defendants have no scientific or objective basis whatsoever by which they classify people into one racial

category or another, for purposes of granting preferences or imposing detriments concerning job opportunities with defendants. Defendants have no dispute-resolution procedure by which a person seeking to be placed in one category, instead of another, can complain, or by which a person complaining of the categorization of another person may complain.

(17) Plaintiffs have complied with all administrative remedies they may have had to exhaust under Title VII of the Civil Rights Act of 1964 by filing timely charges with the EEOC and by receiving a right-to-sue letter prior to the end of the trial.

(18) It was not established by competent evidence that the State Personnel Board, State of California, has engaged in, or endorsed or approved on the part of the Department of Corrections, State of California, a system of granting illegal preferences in civil service matters to minorities and/or women which would constitute illegal discrimination.

(19) The unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system require the Department to exercise broad discretion in making job assignments and in determining the employment responsibilities of its employees. Because of the conditions and circumstances within California prisons and throughout the Department of Corrections, in making job assignments and in determining employment responsibilities it is necessary for the Department to consider, among other factors, the composition of the existing work

force and of the inmate population, and the race and sex of employees, in order to serve the compelling state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

(1) Plaintiffs are entitled to injunctive relief.

(2) Defendants, Department of Corrections and Jeri J. Enomoto, by engaging in the employment practices above-described, have violated and are continuing to violate the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq., Article 1, Section 7 and 8 of the California Constitution, 42 U.S.C. §§ 1981 and 1983, California Labor Code § 1410, et seq., and Government Code § 50084. This Court has jurisdiction to grant relief under each of the above-quoted constitutional provisions and/or pieces of legislation.

(3) Defendants, Department of Corrections and Jeri J. Enomoto, by engaging in the employment practices above-described, and by the arbitrary and capricious nature of the racial categorization process they have utilized, have deprived and are continuing to deprive plaintiffs and all other employees of the Department of substantive and procedural due process of the law within the meaning of both the Fourteenth Amendment to the United States Con-

stitution and within the meaning of Article 1, Section 7 of the California Constitution.

(4) It is not contrary to law for the Department, in determining job assignments and job responsibilities of its employees, to consider, among other relevant factors, the composition by race and sex of the existing work force and of the inmate population, and the race and sex of the employees in question.

JUDGMENT IS HEREBY ORDERED TO BE ENTERED ACCORDINGLY.

DATED: October 11, 1977

/s/ BYRON ARNOLD
Judge of the Superior Court

Approved as to form:

Howard, Prim, Rice, Nemerovski,
Canady & Pollak

Dated: October 11, 1977

By /s/ STUART R. POLLAK
Stuart R. Pollak
Attorneys for California
Department of Corrections and
Jeri J. Enomoto

Approved as to form:

OFFICE OF THE
ATTORNEY GENERAL

Dated: October 11, 1977

By /s/ GORDON ZANE

Gordon Zane
Attorneys for the State
Personnel Board and State of
California

Approved as to form:

Carroll, Burdick & McDonough

Dated: October 11, 1977

By /s/ RONALD YANK

Ronald Yank
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Appendix G

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Attorneys for Plaintiffs

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 700 048

Wayne Minnick, et al.,
Plaintiffs,
vs.
California Department of Corrections, et al.,
Defendants.

[Filed October 11, 1977]

PERMANENT INJUNCTION

To: California Department of Corrections; Jeri J. Enomoto, Director of the California Department of Corrections; and Their Officers, Agents, Servants and Employees, and all Persons Acting in Concert With Them:

The above-entitled matter came on regularly for trial, which trial commenced on August 23, 1976. The trial on the issue of liability was concluded in October, 1976; the

parties submitted Post-Trial Briefs; and oral argument was held subsequent to the submission and consideration of same on November 23, 1976.

The Court having heard the testimony, received the oral and documentary evidence, and having considered oral and written arguments offered by the respective parties, and having issued its NOTICE OF INTENDED DECISION, filed herein on January 5, 1977, and good cause appearing:

IT IS HEREBY ORDERED that defendants, California Department of Corrections, Jeri J. Enomoto, Director of the California Department of Corrections, and their officers, servants, and employees, and each of them, and all persons acting in concert or participating with such parties, entities or person, shall be, and they hereby are, enjoined and restrained from engaging in, committing, or performing, directly or indirectly, or by any means whatsoever, any and all of the following acts:

(1) From hiring or promoting any employee in the Department of Corrections in which preference, advantage, or benefit is given to race, color, sex, or national origin.

(a) Provided, however, that nothing in this Order shall prevent any person, in determining the assignments and job responsibilities of employees of the Department of Corrections, from considering, among other relevant factors, the race and sex of the employees in question.

(b) Provided, however, "male only," "female only," and bi-lingual certifications may be requested and/or granted when the job-related aspect of the certification can be objectively and demonstrably shown and established.

(2) From taking any action against any plaintiff in this action, any witness who testified in the trial or other hearings in this action, or any person who participated in or cooperated in any way in the prosecution of this action, or from imposing any detriment whatsoever upon any such person or party or entity for such involvement in this suit, including the encouraging of persons to take action against any such person or party or entity for such involvement in this action.

Dated: October 11, 1977

By /s/ BYRON ARNOLD
Judge of the Superior Court

Approved as to form:

Howard, Prim, Rice,
Nemerovsky, Canady & Pollak

Dated: October 11, 1977

By /s/ STUART R. POLLAK
Stuart R. Pollak
Attorneys for California
Department of Corrections and
Jeri J. Enomoto

Approved as to form:

Office of the Attorney General

Dated: October ...., 1977

By /s/ GORDON ZANE

Gordon Zane
Attorneys for the State
Personnel Board and State of
California

Approved as to form:

Carroll, Burdick & McDonough

Dated: October 11, 1977

By /s/ RONALD YANK

Ronald Yank
Attorneys for Plaintiffs

Appendix H

United States Code Service, L. Ed., USCS Constitution, Amendment 14, pgs. 444-445:

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code Service, L. Ed., 42 USCS § 1981, pgs. 262-63:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. (R. S. § 1977.)

United States Code Service, L. Ed., 42 USCS § 1983, p. 319:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. § 1979.)

United States Code Service, L. Ed., 42 USCS §§ 2000e, *et seq.*, pgs. 120, *et seq.*

§ 2000e-2. Discrimination because of race, color, religion, sex or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

. . .

(h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . .

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not required on account of numerical or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group be-

cause of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Deering's California Codes, Government Code Annotated, Cal. Const. A. 1, § 7, pg. 613:

[Privileges and immunities]

No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

Deering's California Codes, Government Code Annotated, Cal. Const. A. 1, § 8: pg. 42:

§ 8. [Discrimination on basis of sex, race, etc.]

A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.

Deering's California Codes, Gov. C.A. § 50084, pg. 444:

§ 50084. Hiring practices in conformity to federal act

Each local agency's hiring practices and promotional practices shall conform to the Federal Civil Rights Act of 1964 [28 USCS § 1447; 42 USCS §§ 1971, 1975a-1975d, 2000a-2000h].